



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-89-5

FACTS:

You were recently appointed as Chairman of the Massachusetts Board of Regents (Board). You have also resigned as a partner of Foley, Hoag & Eliot (Firm) and have become "Of Counsel" to the Firm.[1] In that capacity, you are a salaried, contractual employee of the Firm and have forfeited the tenure and benefits which you previously enjoyed as a partner. As "Of Counsel", you are ineligible to participate in the Firm's five-member executive committee or the seven member distribution committee, which make the major management and financial decisions for the Firm. You are also ineligible to vote regarding the Firm's hiring decisions, including whether to accept new partners. Your compensation is fixed and you are ineligible to receive a share of the Firm's profits, discretionary distribution bonuses or deferred compensation. You are not eligible for continued membership in the Firm's Keough plan, and your partnership contribution will be returned to you following the Firm's calculation of the value of your former share.

You will retain the location of your current office, which is located on a floor with partners and associates, and will share the same access to office support resources which is available to all Firm partners and associates. The change in your status has been confirmed internally in the Firm and has been communicated to the news media. Your name appears on the Firm's letterhead as "Of Counsel" and you are not held out by the Firm as a partner.

The Firm has altered its accounting practices to insure that you will receive no portion of any revenue the Firm receives either from state agencies within the official responsibility of the Board or from any of the Firm's private educational institution clients on matters within the official responsibility of the Board. The Firm has a special payroll account out of which employees, but not partners, are paid. The payroll account is segregated from the account into which Firm receipts are paid. You will be paid from the special payroll account. In addition, all receipts from public and private institutions on matters within the responsibility of the Board will be deposited in a separate account, further segregated from the general accounts of the Firm.

The Firm does represent, and has represented, a number of private educational institutions, including, at various times, Boston University, Newbury College, Boston College, Berklee College of Music, Suffolk University, Williams College, Northeastern University, Harvard University, Curry College, Regis College, Worcester Polytechnical Institute and the Association of Independent Colleges and Universities. The Firm also

represents the University of Massachusetts. On occasion, the Firm has represented other institutions which may have an interest in obtaining degree granting authority from the Board. In addition, one of the Firm's partners serves as a member of the Board of Trustees of Mass. Bay Community College (MBCC), an institution within the official responsibility of the Board.

QUESTION:

Does G.L. c. 268A permit you to serve as Chairman of the Board and also as "Of Counsel" to the Firm?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

1. Jurisdiction

Upon your commencing services as a Board member and chairman, you became a "state employee" for the purposes of G.L.c. 268A. In view of the part-time, uncompensated nature of your position, you are also considered a "special state employee" under G.L. c. 268A, s.1(o). As a special state employee, you are eligible for certain exemptions, thereby permitting you more opportunities for outside dealings with state agencies than would otherwise apply if you were a full-time state employee.

2. Limitations on Your Private Law Practice

a. Section 4

This section prohibits you from receiving compensation^[2] or acting as agent or attorney for any non-state party in connection with any decision, contract, or other particular matter^[3] in which you have either participated^[4] or have official responsibility^[5] for as a Board member.^[6] For example, if the Firm were asked to represent a private university client in connection with an accreditation or licensure proceeding from the Board, you could neither represent the client nor receive compensation from the client in connection with the representation.

Because the definition of Compensation includes fees received by you for the services of others in the Firm, you will be required to segregate your compensation from the fees which the Firm receives for its representation of clients in Board matters. The payroll accounting steps which you and the Firm have adopted to segregate your income appear sufficient to avoid your indirectly receiving compensation in connection with matters under your official Board responsibility. See EC-COI-85-21.

b. Section 7

This section generally prohibits a state employee from having a financial interest in a contract made by a state agency. As a special state employee, however, you may have a financial interest in contracts made by a state agency in whose activities you neither participate nor have official responsibility for as a Board member, following your submission to the Commission of a disclosure of the financial interest pursuant to s.7(d). Although your opinion request does not specify whether you intend to consult to or represent any state agencies in your private practice, the exemption conditions, including disclosure, will need to be observed whenever such opportunities arise for you. The fact that the Firm may represent state agencies under the Board's jurisdiction will not place you in violation of s.7 as long as you have no financial interest in those contracts and refrain from working for the Firm under those contracts. In this regard, the Firm's maintenance of its payroll account segregation procedure will avoid your indirectly receiving fees derived from the Firm's contracts with state agencies within and outside of the Board jurisdiction.

3. Limitations on Your Official Activities as a Board Member

a. Section 6

This section, in relevant part, prohibits your official participation as a Board member in any particular matter in which either you or the Firm has a financial interest. Included within the matters requiring your abstention will be all matters in which the Firm is representing a private or public sector client before the Board. The abstention requirement will also apply to matters in which the Firm has a reasonably foreseeable financial interest. EC-COI-84-96. For example, if the Board is considering a decision which will generate additional legal work for the Firm in its representation of a public sector institution, s.6 will require your abstention from that decision.[7] Two limited exemptions to s.6 do not appear to be relevant, inasmuch as you state that you intend to abstain from any discussion or vote on Board matters in which the Firm represents a client. The first, s.6(3), permits your participation in such matters following the receipt of written permission of your appointing official. The second, contained in G.L.c. 15A s.2, permits participation by Board members in certain matters affecting educational institutions with which such members are abated. As long as you continue to abstain officially from matters involving the Firm, these exemptions will not come into play.

b. Section 23

As a state employee, you are subject to certain standards of conduct appearing in G.L.c. 268A, s.23. Specifically, you may not use your official Board position to secure for yourself or others unwarranted privileges or exemptions of substantial value, and you must avoid creating the reasonable appearance of undue favoritism. Issues under this section could arise in light of the fact that one of the firm's partners as an unpaid member of the Board of MBCC, an institution within the Board's official responsibility. Your intention to abstain from official participation in any matter in which the partner has

participated trustee will avoid your exercising any actual or apparent favoritism toward MBCC in violation of s.23. You must also bear in mind the confidentiality restrictions of s.23(c) and refrain from disclosing to the Firm any confidential information which you have acquired as a Board member.

4. Limitations on Firm Partners

Prior to your appointment as Board chairman, you were a partner of the Firm. Were you to retain your partnership while serving on the Board, your partners would share the restrictions which G.L.c. 268A places on your private law practice. Specifically, s.5(d) would prohibit your partners from receiving compensation from or acting as agent or attorney for any non-state client in connection with any particular matter in which you have participated or which is within your official responsibility as a Board member.

Based on the information you have provided, we conclude that you are no longer a partner of the Firm for the purposes of s.5(d) following your resignation as a partner and your assuming "Of Counsel" status to the Firm. To be sure, the Commission has recognized that a change in title does not avoid creating the appearance of partnership status if an individual retains the attributes of partnership and is held out by the Firm to be a partner. See EC-COI-80-43 Because arrangements such as "Of Counsel" do not have a uniformly accepted meaning among law firms, the Commission will examine the substance of the relationship between an attorney and a firm to determine whether the appearance of a partnership exists. See EC-COI-83-81; 82-68. Our conclusion that no actual or apparent partnership between you and the Firm exists is based on:

1. your public announcements that you were resigning your partnership;
2. the appearance of your "Of Counsel" status on the Firm's letterhead; and
3. the terms of your new arrangement under which you will forfeit the benefits available to partners, including the sharing of profits and voting at firm management and financial committee meetings.

This conclusion is consistent with Commission opinions which have found other "Of Counsel" arrangements to lack the attributes or appearance of partnership. See EC-COI-89-7; 86-11. Should your relationship with the Firm change in any material way during your tenure as Board Chairman, however, this conclusion will need to be re-examined in light of those changes.[8]

5. Post-State Employment Limitations

Following the completion of your membership on the Board, you will be considered a former state employee. Section 5 of G.L. c. 268A places certain limitations on the post-employment activities of former state employees and their partners. As applied to you, s.5(a) will prohibit your receipt of compensation from or acting as agent or attorney for a non-state party in connection with any particular matter in which you previously

participated as a Board member. Should you return to your partnership status with the Firm during the one-year period following the completion of your Board services, the restrictions of s.5(a) will also apply to your partners during that one-year period. G.L. c. 268A, s.5(c). These restrictions will not apply, however, if you retain your "Of Counsel" relationship during the one-year period following the completion of your Board services.

Aside from s.5(a), you will also be prohibited from appearing personally before any state court or agency in connection with any particular matter which was within your official responsibility as a Board member (whether or not you abstained from participating in the matter) during the two-year period prior to the completion of your Board services. G.L. c. 268A, s.5(b). This prohibition, which will last for one year following the completion of your Board services, applies to your oral and written communications, EC-COI- 87-27, but does not apply to Firm partners or employees.

DATE AUTHORIZED: March 8, 1989

*Pursuant to G. L. c. 268B, s.3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1] At the time of your advisory opinion request, you were aware that if you were to retain your partnership status, Firm partners would be precluded from representing private clients in connection with matters within the official responsibility of the Board. Therefore, you choose to resign as a partner.

[2] "Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, s.1(a). [3] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, s.1(k).

[4] "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, s.1(j).

[5] "Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, s.1(i).

[6] If you serve for more than 60 days in any 365-day period, the s.4 restrictions apply to all matters pending in the Board. For the purposes of this opinion, the matters within your official responsibility are co-extensive with matters pending in the Board.

[7] We will presume that the Firm has a financial interest in all matters in which it represents clients for a fee.

[8] The fact that you may one day apply to return to the Firm as a partner does not, without more, make you a continuing partner for G.L. c. 268A purposes during the period of your "Of Counsel" status. If you were on leave of absence from the partnership and were granted Firm benefits comparable to partners during your leave, however, we might be inclined to reach a different result. Cf. EC-COI-84-86 (status as a state employee continues during a leave of absence in which an employee retains certain state employment benefits). We do not reach such a result in your case, inasmuch as you have resigned from the partnership and have no right to return to your former status, and you do not receive the same benefits which are available to Firm partners.